Supreme Court of the United States

No. 411—October Term, 1946

THE PEOPLE OF THE STATE OF NEW YORK on Complaint of MICHAEL FITZGERALD,

Respondent,

against

HAROLD HERMAN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

September 5, 1946.

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INDEX

Table of Cases Cited

Statutes Cited

Reported Below

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Statement of Facts

The petitioner seeks to have this Court review by writ of certiorari an order of the Appellate Division of the Supreme Court of the State of New York, which unanimously affirmed a judgment of a Court of Special Sessions held by a City Magistrate of the City of New York, convicting the petitioner of a violation of § 225 of the Sanitary Code of the City of New York relating to the heating of occupied buildings (see Appendix, *post*, pp. 11-12) and sentencing him to payment of a fine of $150 with the alternative of imprisonment for 60 days. The fine was paid (R. 7). The proceedings in the Trial Court are unreported. The affirmance by the Appellate Division was without opinion and is reported in 270 N. Y. App. Div. 891.

An application to the Appellate Division for leave to appeal to the New York Court of Appeals was dismissed.

While the order of dismissal is printed in the record (R. 95-96), the memorandum decision of the Court is not. It is reported in 270 N. Y. App. Div. 1014 and reads as follows:

> "*The People of the State of New York* v. *Harold Herman.*—Motion for leave to appeal to the Court of Appeals dismissed. (See Code Crim. Pro., § 520; *People* v. *Geffin,* 245 N. Y. 75.) Present—MARTIN, P.J., DORE, COHN, CALLAHAN and PECK, JJ. [See *ante,* p. 891.]"

A subsequent application for leave to appeal was made to Judge STANLEY H. FULD of the New York Court of Appeals and was likewise dismissed. The order of dismissal is in the record (R. 97-98) and is unreported.

The petitioner is in error in his repeated statement (petition, pp. 2, 3, 4; brief, p. 1) that the applications for leave were denied. The fact is that they were dismissed and that the dismissals were due to the petitioner's failure to comply with the statutory requirements of the State of New York relative to appeals in criminal cases.

Outline of Argument

The petitioner has failed utterly to meet the prerequisites to a review by this Court of the final judgment or decree of a state Court, as laid down in § 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 937; U. S. Code of Laws, Tit. 28, § 344). We shall show that:

I. The Appellate Division of the Supreme Court is not the highest court of the State of New York in which a decision could be had of the criminal action. The failure of the defendant, petitioner here, to make timely application for leave to appeal to the Court

of Appeals bars a review by this Court of the order of the Appellate Division.

II. No federal question was either raised or passed upon by the Courts of the State of New York; hence, there is nothing for this Court to review. The defendant's guilt was in any event fully established by competent proof.

POINT I

The Appellate Division of the Supreme Court is not the highest court of the State of New York in which a decision could be had of the criminal action. The failure of the defendant, petitioner here, to make timely application for leave to appeal to the Court of Appeals bars a review by this Court of the order of the Appellate Division.

Authority for the review by certiorari by this Court of a judgment or decree of a State Court is found in § 237 of the Judicial Code (28 U. S. C. A., § 344) which, so far as here relevant, provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed upon by the highest court of a State in which a decision could be had * * *."

The petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York which had affirmed a judgment of a Court of Special Sessions convicting him of a misdemeanor. The statutory provisions of the State of New York governing appeals in

criminal cases are found in §§ 520 and 521 of the New York Code of Criminal Procedure which are set out in the Appendix, *post*, pp. 13-14. These sections were considered by the Court of Appeals of the State of New York in *People* v. *Geffin*, 245 N. Y. 75 (1927), where it was said (p. 76):

> "Under the amendments to section 520 made by the Laws of 1926, chapter 465, taking effect July 1, 1926, but one appeal is allowed in a criminal case as matter of right. An appeal must be taken within thirty days after the judgment is entered. A further appeal may be taken to the Court of Appeals where a judge of that court or a justice of the Appellate Division of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the Court of Appeals. The Legislature, however, has failed to prescribe any time within which the application for such a certificate shall be made.
>
> By section 521 an appeal must be taken within thirty days after the judgment was rendered or the order entered. The word 'order' evidently refers to the order of the Appellate Division. As the appeal must be taken within thirty days after the entry of such an order it necessarily follows that the application for the certificate permitting such an appeal must also be applied for within those thirty days."

In the instant case the order of affirmance of the Appellate Division was entered in the office of the Clerk of that Court on April 18, 1946, and a copy thereof with notice of entry was served on the then attorney for the defendant (petitioner here) on April 22, 1946 (cf. R. 90, 94). Under the applicable provisions of the New York Code of Criminal Procedure the time of the defendant to apply to a Judge of the Court of Appeals or a Justice of the Appellate Divi-

sion for leave to appeal to the Court of Appeals expired on May 18, 1946.

The defendant made no application within the statutory period. By notice of motion dated June 17, 1946, and served on June 19, 1946, he moved in the Appellate Division for leave to appeal. That motion was not only untimely but was further improper because it was made to the Court instead of an individual Justice thereof. See *People* v. *McCarthy*, 250 N. Y. 358, 361-362 (1929). The Appellate Division accordingly dismissed the motion for leave and referred in its memorandum decision (set forth *ante*, p. 2) to *People* v. *Geffin*, *supra* [245 N. Y. 75], which, as we have seen, held that an application for leave to appeal must be made within 30 days after entry of the judgment or order from which the appeal is sought.

Thereafter and on July 3, 1946, a verbal application for leave to appeal was made to Judge STANLEY H. FULD of the New York Court of Appeals. He dismissed the application and in his formal order inserted a statement "that the application to me is made more than 30 days after the entry of the order of the Appellate Division, First Department, affirming the judgment of conviction" (R. 98).

It thus plainly appears that the defendant made no move to procure leave to appeal to the Court of Appeals until after the time limited by statute for such application had expired. It cannot, therefore, be said that the Appellate Division was the highest court of the state in which a decision could be had. It may well be that had the defendant followed the proper practice he would have been granted leave to appeal and would have secured a determination on the merits by the Court of Appeals. It follows that the petitioner has not met the requirements of the Judicial Code and that his petition should be dismissed. It will suffice in this respect

to quote the words of Chief Justice WAITE in *Fisher* v *Perkins*, 122 U. S. 522 (1887), where he said (pp. 525-526):

> "This court has no power to review any other judgments of the courts of a state than those of the highest court 'in which a decision in the suit could be had.' § 709, Rev. Stat. The Court of Appeals is the highest court of the state of Kentucky, and, consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court, we are not authorized to review the judgment of the Superior Court. Although the value in controversy is less than $1000, and the judgment of the inferior court was affirmed by the Superior Court without a dissenting vote, an appeal did lie to the Court of Appeals if two of the judges of the Superior Court certified that, in their opinion, the question involved was novel and of sufficient importance.
>
> To get an appeal from the Superior Court in any case an application therefor must be made to and granted by that court. Such is the express provision of § 7 of the act under which the court was organized. Certainly it would not be claimed that a judgment of the Superior Court could be reviewed by this court in a case not within the exceptions mentioned in § 5 before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason."

And see *John* v. *Paullin*, 231 U. S. 583 (1913); *Stratton* v. *Stratton*, 239 U. S. 55 (1915); *McMaster* v. *Gould*, 276 U. S. 284 (1927); *Gorman* v. *Washington Univ.*, 316 U. S. 98 (1941).

POINT II

No federal question was either raised or passed upon by the Courts of the State of New York; hence, there is nothing for this Court to review. The defendant's guilt was in any event fully established by competent proof.

The petition states (p. 3) that the "jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code (28 U. S. C., § 344)." The cited subdivision provides for review by way of appeal. We assume that the petitioner intended to refer to subdivision (b) governing applications for writs of certiorari since that is the relief requested (petition, p. 9). In any event, it is clear that a review is sought of the decision of a state court and it is equally clear that, as stated by Chief Justice HUGHES in *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52 (1934), at pp. 54-55:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. [Citing cases] Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. [Citing cases]"

The record in the case at bar will be searched in vain for any suggestion that a federal question was presented

to the Courts of the State of New York, much less than a question of that nature was passed upon by them. More specifically, the defendant's motions to dismiss did not include a constitutional ground (R. 42, 74); no motion was made by him in arrest of judgment; and the belated notice of motion for leave to appeal addressed to the Appellate Division recited that the application was made (R. 85)

> "upon the ground that the conviction of defendant-appellant by the Court of Special Sessions of the City of New York was based upon an erroneous construction by the Trial Court of appropriate provisions of the Penal Law of the State of New York and of the Sanitary Code of the City of New York, which said construction of said statute and ordinance is at variance with the decisions of the Courts of this State, construing the same or similar statutes, and upon the ground that the evidence adduced at the trial does not establish the guilt of defendant-appellant beyond a reasonable doubt, as required by the Constitution and statutes of the State of New York, * * *."

It will be observed that the notice of motion did not so much as mention any article or provision of the Constitution, treaties, or laws of the United States. The construction, application and effect of the Constitution and statutes of the State of New York are, of course, matters of state concern and cannot be employed to invoke the limited jurisdiction of this Court. *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175 (1897); *California National Bank* v. *Thomas*, 171 U. S. 441, 446 (1898); *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328 (1933).

And apart from all the considerations already dealt with, we would add that even assuming, *arguendo*, that the petitioner is rightfully here, it is apparent that the sub-

stantive contention which he urged upon this Court is without merit. If we understand him correctly, his position is that error was committed by the state Courts when he was found to be guilty of the misdemeanor charge despite an alleged lack of any criminal intent or *mens rea*. But the Sanitary Code section involved does not make guilt dependent on wilfulness, malice or wrongful motive. It falls rather within the class of legislative enactments referred to by this Court in *United States* v. *Dotterweich*, 320 U. S. 277 (1943), where it was said (pp. 280-281):

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. See *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 57, and *McDermott* v. *Wisconsin*, 228 U. S. 115, 128. The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U. S. 250."

Moreover, provision is separately made by the applicable statutes for the punishment, on the one hand, of those guilty generally of a violation of the Sanitary Code and like enactments, and, on the other hand, of those specifically charged with a "Wilful violation of health laws" (cf. Sanitary Code, § 224; Penal Law, §§ 1740, 1937; see Appendix, *post*, pp. 12-13).

If we accept, too, for the moment, the petitioner's contention that "wilfulness or intent" is an essential element of the crime charged (petition, p. 8), it still does not avail him. As Mr. Justice HOLMES said in *Ellis* v. *United States*, 206 U. S. 246 (1906), at page 257:

> "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

And see *Horning* v. *District of Columbia*, 254 U. S. 135, 137 (1920); *Screws* v. *United States*, 325 U. S. 91, 96-97 (1944).

It remains only to note that counsel for the defendant conceded on the trial that a landlord who would undertake to convert the heating system of an apartment house from oil to coal, or *vice versa*, during the winter season without provision for maintaining the temperature of the dwelling at the minimum fixed by law, could properly be held to have violated the statute (R. 75-76).

CONCLUSION

The petition for certiorari should be dismissed for lack of jurisdiction or, in the alternative, should be denied for want of a federal question.

September 5, 1946.

Respectfully submitted,

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SEYMOUR B. QUEL,
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APPENDIX

Statutes Involved

Sanitary Code of City of New York

§ 225. Heating of occupied buildings.

It shall be the duty of every person who shall have contracted or undertaken, or shall be bound, to heat, or to furnish heat for any building or portion thereof, occupied as a home or place of residence of one or more persons, or as a business establishment where one or more persons are employed, to heat, or to furnish heat for every occupied room in such building, or portion thereof, so that a minimum temperature of sixty-eight (68) degrees Fahrenheit may be maintained therein at all such times. Provided, however, that during the period fuel oil is rationed by the Office of Price Administration because of the present war emergency, it shall not be deemed a violation of this section if a minimum temperature of sixty-five (65) degrees Fahrenheit is maintained at all such times in a building where oil is the fuel exclusively used for the heating of the building. The provisions of this section shall not apply to buildings, or portions thereof, used and occupied for trades, businesses, or occupations where high or low temperatures are essential and unavoidable.

For the purpose of this section, wherever a building is heated by means of a furnace, boiler, or other apparatus under the control of the owner, agent, or lessee of such building, such owner, agent, or lessee, in the absence of a contract or agreement to the contrary, shall be deemed to have contracted, undertaken, or bound himself or herself to furnish heat in accordance with the provisions of this section.

The term "at all such times" as used in this section, unless otherwise provided by a contract or agreement, shall include the time between the hours of 6 a. m. and

10 p. m. in a building, or portion thereof, occupied as a home or place of residence, of each day whenever the outer or street temperature shall fall below fifty-five (55) degrees Fahrenheit, and during the usual working hours established and maintained in a building, or portion thereof, occupied as a business establishment, of each day whenever the outer or street temperature shall fall below fifty (50) degrees Fahrenheit.

The term "contract" as used in this section shall be taken to mean and include a written or verbal contract.

§ 224. Punishment for violation of the Sanitary Code.

Any violation of the Sanitary Code of The City of New York shall be punished in the manner prescribed by Sections 1740 and 1937 of the Penal Law of the State of New York, Section 558 of the New York City Charter, and Section 564-6.0 of the Administrative Code of The City of New York.

N. Y. Penal Law

§ 1740. Wilful violation of health laws

1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor.

2. A person who wilfully violates any provision of the health laws, or any regulation lawfully made or established by any public officer or board under authority of the health laws the punishment for violating which is not otherwise prescribed by those laws, or by this chapter, is punished by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

§ 1937. Punishment of misdemeanors when not fixed by statute

A person convicted of a crime declared to be a disdemeanor, for which no other punishment is specially

prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both.

N. Y. Code of Criminal Procedure

§ 520. Appeal, a matter of right; one appeal; how taken

All appeals, provided for in this chapter may be taken as a matter of right. Every person convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal as herein provided, but there shall be only one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided.

1. In the city of New York such appeals shall be taken as follows: From a conviction by a city magistrate to the appellate part of the court of special sessions; from a conviction by a court of special sessions to the appellate division of the supreme court of the department in which the conviction was had; from a conviction by the court of general sessions of the county of New York or by a county court within said city or from the supreme court except where the penalty is death, to the appellate division of the supreme court of the department in which the conviction was had; from a conviction by said court of general sessions or by said county courts or supreme court where the penalty is death, to the court of appeals.

* * * * * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals hereinabove referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not other-

wise. If a judge of the court of appeals or a justice of the appellate division of the supreme court of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

4. The provisions of this section shall supersede all other provisions of this code, or of any other law, dealing with appeals in criminal actions and proceedings, in so far as they may be in conflict with the same.

§ 521. Appeal to be taken; when

An appeal must be taken within thirty days after the judgment was rendered or the order entered; * except that when a party takes an appeal to the court of appeals after obtaining a certificate pursuant to subdivision three of section five hundred twenty, such appeal shall be timely if the application for leave to appeal is made within such thirty days and if the notice of appeal is duly served and filed within fifteen days after the certificate is granted.*

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* Words between asterisks were added by L. 1946, c. 942, the purpose of which was to temper the harsh rule laid down in *People* v. *Geffin, supra* [245 N. Y. 75], that where an application for leave to appeal is duly made but is granted after expiration of the 30-day period, the appeal must be taken "forthwith". See Twelfth Annual Report of the Judicial Council of the State of New York (1946), at pp. 297-298. The amendment does not enlarge the time within which an application must be made and does not, therefore, affect the situation in the instant case.